#### Native Hawaiian Law Training

# Native Hawaiian Traditional & Customary Rights and Practices

HAHAI PONO I KE ALA KUKUI ME KA HULI AO

PURSUE THE PATH OF ENLIGHTENMENT THROUGH JUSTICE

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1

#### Today's Roadmap

- Contextual framing for understanding the protection of traditional & customary rights
- Key statutory and constitutional provisions
- Select Hawai'i cases
- Analytical framework for agency actions
- ➤ Brief note on T & C in the criminal context
- Summary and key points

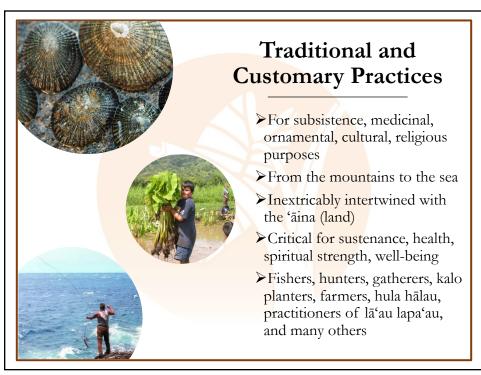




# Contextual framing for traditional and customary rights

- As a result of Western colonization, Native Hawaiian traditional and customary rights were impaired, ignored, unenforced for many years
- State's restorative approach seeks to at least partially repair some of that harm
- Strong reaffirmation of Native Hawaiian traditional and customary rights in Hawai'i Constitution

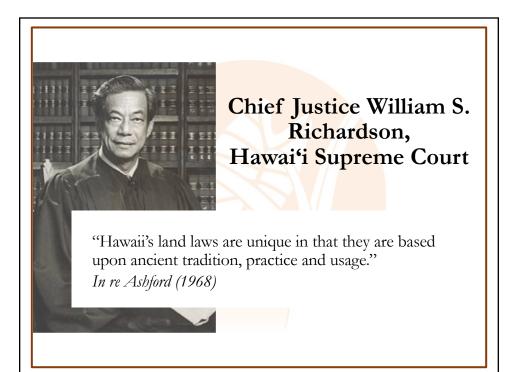
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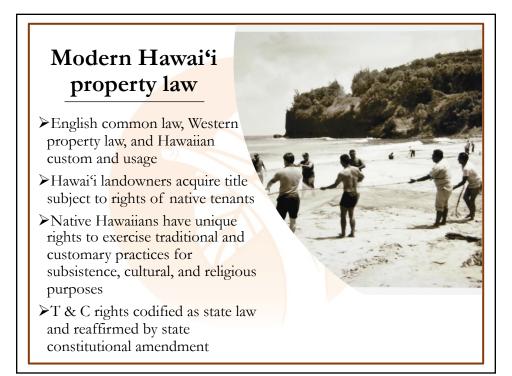


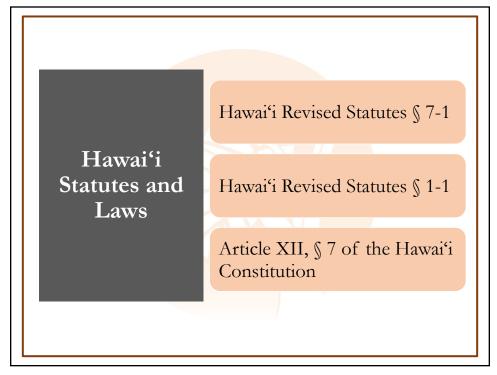
# The Māhele: A Revised Model for Land Use in Hawai'i

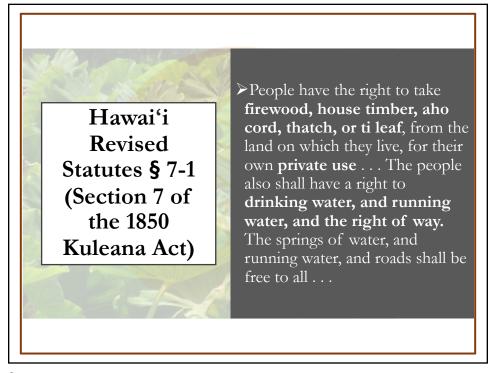
- ➤ Kamehameha III, Kauikeaouli, transformed communal land to a modern property regime
- Lands subject to rights of native tenants
- Traditional and customary rights survived the transition

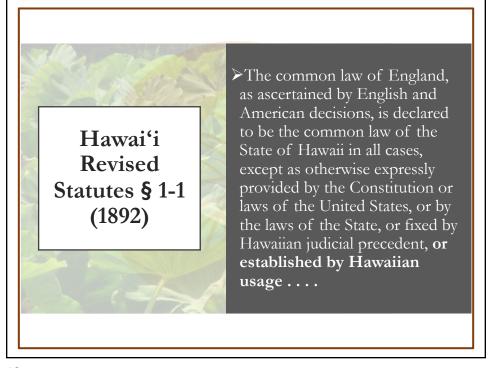




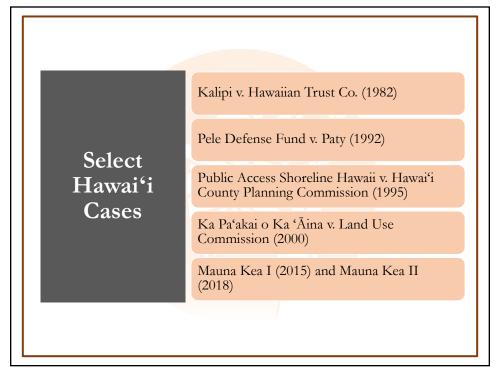












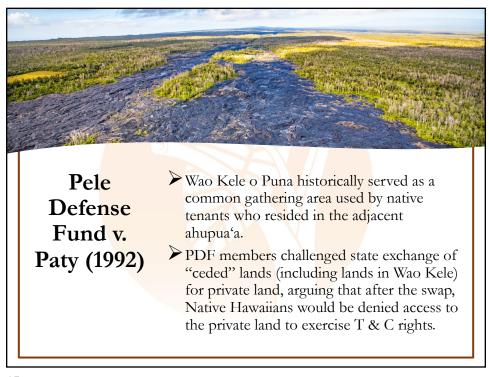


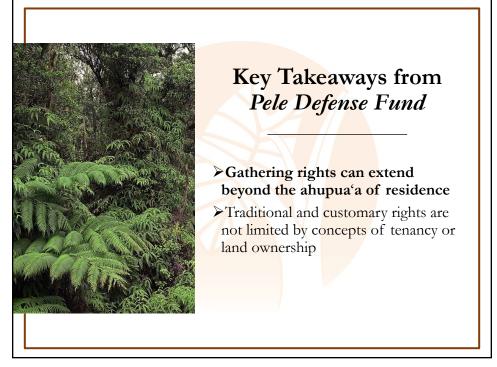
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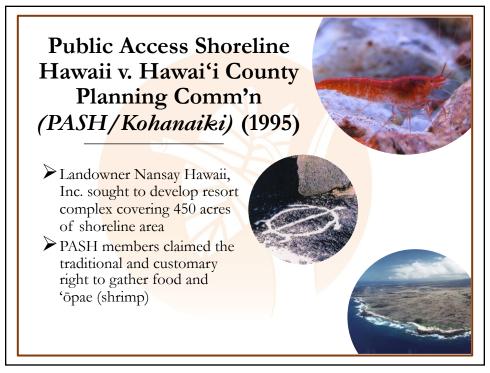
# Key Takeaways from *Kalipi*

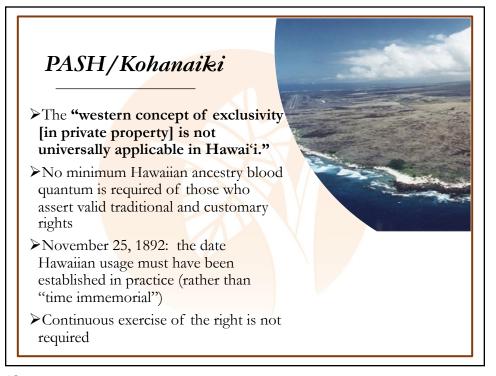
- Native tenants have right to gather products enumerated in Kuleana Act, HRS § 7-1 (firewood, house timber, aho cord, thatch, or ti) for personal use
- ➤ Must balance right to gather with private property rights
- ➤ HRS § 1-1 protects other (broader) T&C practices that have continued "so long as no actual harm is done thereby."













# Key Takeaways from *PASH/Kohanaiki*

- Native tenants can gather anywhere that such rights have been customarily and traditionally exercised for subsistence, cultural and religious purposes
- Can gather on land that is less than fully developed
- Government cannot regulate traditional and customary rights out of existence
- ➤ Interests of the property owner and native tenants must be balanced
- Balance weighs in favor of property owner if native tenants exercise otherwise valid customary rights in an unreasonable manner (time, place, manner of access)

10

### Ka Pa'akai o Ka 'Āina v. Land Use Comm'n (Ka Pa'akai) (2000)

- Developer sought to develop over 1,000 acres of privately owned conservation and agricultural land in the ahupua'a of Ka'ūpūlehu for luxury residential development
- Plaintiffs asserted traditional and customary right to gather sea salt, 'opihi, limu, kūpe'e, Pele's tears, and hā'uke'uke

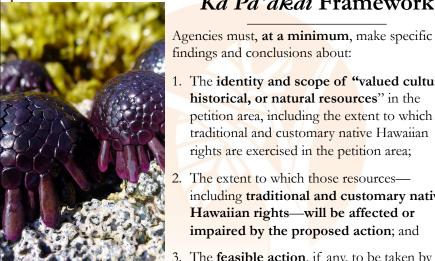


#### Ka Pa'akai

- The state and its agencies are obligated to protect the reasonable exercise of customarily and traditionally exercised rights of Native Hawaiians to the extent feasible:
- Agencies are obligated to make an assessment, independent of the developer or applicant, of the impacts on traditional and customary practices of Native Hawaiians; and
- The independent assessment must include three factors known as the "Ka Pa'akai framework."



#### Ka Pa'akai Framework



findings and conclusions about: 1. The identity and scope of "valued cultural,

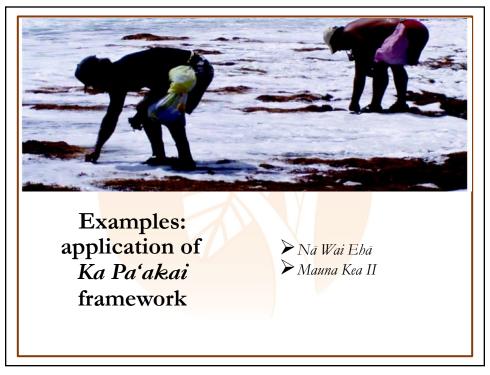
- historical, or natural resources" in the petition area, including the extent to which traditional and customary native Hawaiian rights are exercised in the petition area;
- The extent to which those resources including traditional and customary native Hawaiian rights—will be affected or impaired by the proposed action; and
- The **feasible** action, if any, to be taken by the agency to reasonably protect native Hawaiian rights if they are found to exist.

## Further context for Ka Pa'akai

- ➤ Government agencies may not delegate their obligation to consider the effect of a proposed action on traditional and customary rights to the developer or applicant
- An agency's failure to condition permitted uses upon protection of Native Hawaiian traditional and customary practices is sufficient grounds for invalidating that agency's decision to grant the underlying permit



23



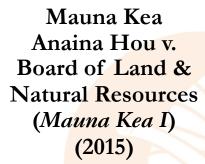


#### Example:

Nā Wai Ehā: Water Commission failed to analyze the effect of reduced stream flow on Native Hawaiian traditional and customary practices such as kalo cultivation and other gathering rights, and failed to assess the feasibility of protecting those practices.

25





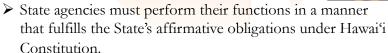
Appeal from issuance of a permit to construct Thirty
Meter Telescope within a conservation district on Mauna
Kea

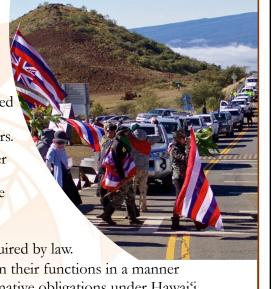


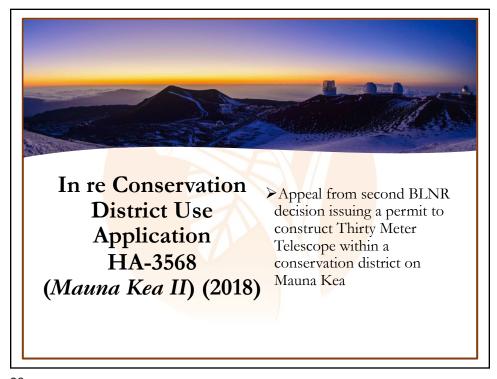
27

#### Mauna Kea I

- Approval of permit before contested case hearing violated due process rights of Native Hawaiian cultural practitioners.
- Native Hawaiian rights under Article XII, § 7 are property interests protected by the due process clause of Hawaiii Constitution.
- Contested case hearing required by law.

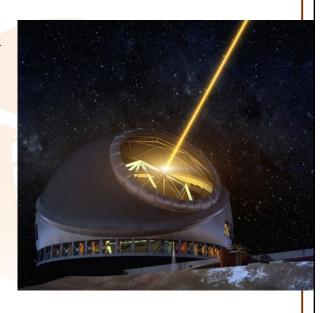






#### Mauna Kea II

Hawai'i Supreme Court held that BLNR fulfilled its duties under Article XII, § 7 and Ka Pa'akai



Ka Pa'akai
Framework, Step 1:
Identity and scope of
"valued cultural,
historical, or natural
resources" in the
petition area,
including the extent
to which traditional
and customary native
Hawaiian rights are
exercised in the
petition area.

BLNR conducted a thorough analysis as required by the first step of the *Ka Pa'akai* analysis.

BLNR found no Native Hawaiian cultural resources or traditional or customary practices within the TMT Observatory site and Access Way, which it characterized as the relevant area.

BLNR concluded that the two ahu constructed on the TMT Access Way in 2015 as protests against TMT are not protected as Native Hawaiian traditional or customary rights.

31

Ka Pa'akai
Framework, Step 2:
The extent to
which those
resources—
including
traditional and
customary native
Hawaiian rights—
will be affected or
impaired by the
proposed action.

BLNR found that since 2000, cultural and/or spiritual practices have been occurring while astronomy facilities have existed, and those activities would not be **prevented** by the TMT Observatory, which would be located 600 feet below summit ridge.

BLNR found that the TMT Project will not adversely impact cultural resources, whether in the relevant area of the TMT Observatory site and Access Way, or in other areas of Mauna Kea.

If the three ahu in the vicinity of the TMT Observatory site are within the relevant area, BLNR found that TMT would not affect them.

If the summit is considered to be within the relevant area, BLNR found that the TMT Observatory will not be visible from culturally sensitive areas of the Mauna Kea summit, and TMT would not impact other cultural practices.

Ka Pa'akai
Framework, Step 3:
The feasible action, if any, to be taken by the agency to reasonably protect native Hawaiian rights if they are found to exist.

"Native Hawaiian rights were not found to have been exercised in the relevant area, so the third requirement was not required to be addressed."

33

#### Burden of proof

In the context of a contested case, permit applicants bear the ultimate burden of demonstrating that their proposed use will not harm traditional and customary Native Hawaiian practices.

- ➤ Hawai'i Administrative Procedure Act: "[i]n contested cases . . . [e]xcept as otherwise provided by law, the party initiating the proceeding shall have the burden of proof, including the burden of producing evidence as well as the burden of persuasion." HRS § 91-10(5).
- > Kukui (Molokai): when Native Hawaiian rights figure in an agency's public trust balancing, the burden is not on Native Hawaiian practitioners to prove that the proposed use would harm traditional and customary Native Hawaiian rights; instead, the permit applicants and the agency are obligated to justify the proposed use and the approval thereof in light of the trust purpose of protecting Native Hawaiian rights.

#### Contemporary practices

Hawai'i Constitution protects modern-day Native Hawaiian cultural practices that are consistent with norms and values of traditional and customary rights and that have evolved beyond their form prior to 1892.

- Mauna Kea II: "BLNR appropriately took into account contemporary (as well as customary and traditional) Native Hawaiian cultural practices, finding that none were taking place within the TMT Project site or its immediate vicinity, aside from the recent construction of ahu to protest the TMT Project itself, which was not found to be a reasonable exercise of cultural rights."
- Case law recognizes that Native Hawaiian practices must be allowed to evolve in contemporary times, consistent with the purpose and spirit of the original traditional practice, and to support a *living* culture.

35

#### Relevant area

Agency analysis of impacts to traditional and customary rights is not limited to the project footprint; agencies cannot disregard broader impacts beyond the specific project site.

- Mauna Kea II: "although BLNR defined the 'relevant area' . . . as the TMT Observatory site and Access Way, the Board's findings also identified and considered the effect of the project upon cultural practices in the vicinity of the 'relevant area' and in other areas of Mauna Kea, including the summit region, as Ka Pa'akai requires."
- ➤ Ka Pa'akai: LUC impermissibly failed to address "possible native Hawaiian rights or cultural resources outside" the relevant area, such as Native Hawaiian practitioners' use of the mauka-makai trails to reach saltgathering areas, the religious significance of the 1800–1801 lava flow, and the gathering of Pele's Tears, etc.

Traditional and Customary Rights in the Criminal Context

<u>Civil</u>: **Permit applicants** bear burden of showing that the **proposed use will not harm** T & C practices (from water law cases)

<u>Criminal</u>: **Individual defendant** claiming exercise of T & C right as affirmative defense against criminal trespass charge must demonstrate that **the right is protected** 

37

#### State v. Hanapi (1998)

- Private property owned by attorney Gary Galiher in the ahupua'a of 'Aha'ino
- ➤ U.S. Army Corps of Engineers ordered Galiher to restore area near two fishponds that had been illegally graded and filled
- Ahupua'a resident Hanapī claimed right and obligation to access the land near fishpond restoration to heal it by performing religious and traditional ceremonies
- ➤ Charged with criminal trespass

#### Hanapi factors

Minimum requirements for defendant asserting traditional and customary rights as an affirmative defense to trespass:

- 1. "native Hawaiian" under PASH/Kohanaiki
- 2. Claimed right is constitutionally protected as traditional and customary practice: expert or kama'āina testimony providing an explanation of the history or origin of the claimed right or a description of the ceremonies involved
- 3. Exercised on undeveloped or less than fully developed property

39

#### Further context for *Hanapi*

"Fully developed" property includes, but is not limited to, "lands zoned and used for residential purposes with existing dwellings, improvements, and infrastructure."

"It is *always* inconsistent to permit the practice of traditional and customary native Hawaiian rights on such property."

#### State v. Pratt (2012)

- ► Undeveloped state land in Kalalau Valley, Kaua'i
- Defendant convicted of "camping" in a closed area
- Defendant claimed interest as kahu and caretaker, temporarily residing in area to tend a heiau, perform cultural ceremonies, clear and repair ancient terraces, and replant native flora
- After the three-part test in *Hanapi* is satisfied, the court must apply a **balancing test** that weighs right to perform traditional and customary practices against the State's interest in regulating such activity
- "Totality of circumstances" test applied on a case-by-case basis

41

#### State v. Armitage (2014)

Petitioners who asserted a native Hawaiian privilege to access Kahoʻolawe Reserve but failed to apply for authorization to enter from the Kahoʻolawe Island Reserve Commission established first and third Hanapi factors, and likely the second, but "the balance weighs in favor of the State's interest in protecting the health and safety of those individuals who travel to Kahoʻolawe."



### State v. Palama (2015) (ICA, unpublished)

Criminal trespass charges dismissed against Native Hawaiian defendant who asserted T & C right to hunt pigs (established by kama aina and expert testimony) on undeveloped private property in Hanapēpē, Kaua'i because Palama had no regulatory process to seek State approval to engage in T&C practices, and landowner's full power to grant or deny such permission acted as extinguishment of Palama's T&C rights.

# Summary: legal bases of T&C rights

- ➤ HRS Section 7-1: protects the right to gather; limited in scope to the enumerated items
- ➤ HRS Section 1-1: provides broader protection for the exercise of T & C rights; extends rights to the gathering of materials essential to tenants' lifestyle
- Article XII, Section 7: ensures protection of T & C Native Hawaiian rights exercised for subsistence, cultural and religious purposes



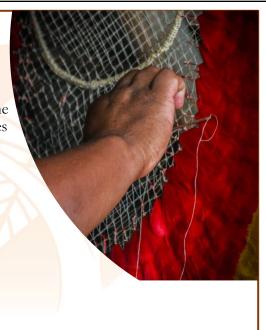
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#### Summary: judicial affirmation of T&C rights

- Legitimate traditional and customary practices must be protected to the extent feasible in accordance with article XII, section 7 of Hawai'i Constitution
- Traditional and customary rights can extend beyond the boundaries of the ahupua'a of residence
- The state does not have the "unfettered discretion to regulate the rights of ahupua'a tenants out of existence."
- The state can permit private property owners to exclude persons "pursuing non-traditional practices or exercising otherwise valid customary rights in an unreasonable manner" or on private property that is "fully developed."

# Summary: agencies' duty

- Article XII, section 7 of the Hawai'i Constitution "places an affirmative duty on the State and its agencies to preserve and protect traditional and customary native Hawaiian rights"
- Thus, Native Hawaiian practitioners' interests and developers'/applicants' interests must be balanced—in the first instance—by the agency



45

### Summary: analysis required

To fulfill obligation to preserve and protect Native Hawaiian rights, agencies at a minimum must independently assess:

- ➤ Identity and scope of existing cultural, historic, or natural resources and extent to which traditional and customary rights are exercised
- Potential effects on and impairment of traditional and customary rights
- Feasibility of the protection of those rights (i.e., explore alternatives to the proposed action and mitigating measures)



# Summary: other important points

- Agencies may not delegate their duty to consider the effect of a proposed action on T & C rights to the developer or applicant.
- In context of contested case, permit applicants bear the ultimate burden of demonstrating that their proposed use will not harm traditional and customary Native Hawaiian practices.
- Agency analysis of impacts to T&C rights is **not limited to the project footprint**; agencies **cannot** disregard **broader impacts** beyond the specific project site.

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#### Effectuate the State's restorative approach

- State's restorative approach is reflected in its strong reaffirmation of Native Hawaiian traditional and customary rights.
- While Western colonization caused drastic changes, cultural practices continue and underlying guiding principles for preserving those practices remain.
- ➤ You play a crucial role: Agencies have a significant and affirmative constitutional duty to preserve and protect traditional and customary rights to the extent feasible.



